United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1031

To be argued by
MARTIN JAY SIEGEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

CHARLES BRADLEY

Appellant.

Docket #76-1031

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Docket #76-1031

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ISSUES PRESENTED

1) Did the trial court err in refusing to charge the jury concerning how an inference may be drawn?

2) Did the trial court abuse its discretion by restricting defense counsel of its cross examination of its agent Jones?

3) Did the trial court err in refusing to grant appellant's request for a hearing on his motion for a new trial?

STATEMENT PURSUANT TO RULE 28(3)

CHARLES BRADLEY JR. appeals from a judgment of the United States District Court for the Southern District of New York, rendered on January 20, 1976, convicting him after trial (CARTER, R. and a jury) of forgery and theft from the U. S. mails. Mr.Bradley was sentenced to a term of one year in prison on both counts to run concurrently. The sentence was suspended as to all but

thirty days. Mr. Bradley is presently free on his own recognizance pending the outcome of his appeal.

STATEMENT OF FACTS

On April 14, 1975, Castro Badilla, the owner of a check casning facility, called 4091 Broadway Check Cashing, had an individual present a United States Government check to him for payment. The stated payee of the check was Frances Berger (T-21)*. Mr. Badilla asked the individual for identification to substantiate that he was Frances Berger. The individual then presented Mr. Badilla with a social security card and selective service card with the name of Frances Berger on it. Mr. Badilla, suspicious of the person presenting the check, called the postal inspectors to come to his place of business. He asked the individual in question to wait till the check was approved.

Approximately twenty minutes later, when the postal inspectors arrived, Mr. Badilla pointed out the individual, who attempted to negotiate the check. That individual was identified in court by the postal inspectors, as being the appellant, Charles Bradley (T-42). It should be noted that at the trial Mr. Badilla was unable to describe the individual who was in his store or point out the defendant as the same (T-26, 7).

*T represents page numbers of official trial transcript

Mrs. Frances Berger testified that she was the true owner of the check and she did not give the appellant, Charles Bradley, permission or authority to negotiate that check.

After the defendant was removed from the premises by agents Dolan and Kearney, he was driven to 66 Post Avenue, the address of the named payee, Frances Berger. During the trip he stated that he wanted to correct his initial version where he stated that [redacted] Frances Berger and the rightful owner of the check. The defendant stated that he was given the check by a friend named Tony (T-46) to go in and cash. Tony purportedly waited outside in a car for him to return. According to the appellant, Tony had asked him to go inside and cash the check using the two pieces of identification and to mention his name (Tony) to the owner of the establishment. The defendant stated that Tony endorsed the check in his presence.

At the area of 66 Post Avenue, the defendant advised the agents where they might find additional checks secreted by Tony and also his (Tony's) place of residence (T-71). The agents went to the said location but were unable to locate the checks or Tony. The only items found were a screw driver and a

pair of squeezers which were under a staircase. Agent Jones went to the alleged apartment of Tony but was unable to find anyone who knew of a Tony at that location (T-72).

The defendant was then brought down to the Bronx General Post Office where the agents took a statement from him. After being advised of his Miranda rights, the defendant signed it. The statement indicated that Tony had given him the subject check with the two pieces of identification, but that the appellant had endorsed the payee's name in the presence of Mr. Badilla. This statement was introduced into evidence over the strenuous objection of trial counsel. Agent Jones stated that handwriting exemplars (T-84) were taken of the defendant, but the subsequent results of those tests were never introduced into evidence by the prosecution.

Mr. Knel Hagopian, a photo technician, testified that his company supplied Mr. Badilla's check cashing service with a camera system, by which all transactions are photographed. The purpose of this was to record the check and the individual in each transaction. The photograph of the particular transaction involved in this case revealed that the appellant was <u>not</u> the

one who tended the check for payment (T-64-5).

At the conclusion of the prosecution's direct case, the appellant moved to dismiss both counts of the indictment. Upon that motion being denied, Mr. Bradley rested upon the presumption of innocence afforded each and every defendant under our criminal justice system. He was found guilty on all counts.

POINT I

DID THE COURT ERR IN REFUSING TO CHARGE THE JURY CONCERNING HOW AN INFERENCE MAY BE DRAWN?

At trial, counsel for defendant requested that the trial judge charge the jury that if there are two inferences flowing from the evidence, one of guilty and one of innocence, then they are to accept the one leaning to innocence and to acquit the defendant. The trial judge refused to grant counsel's written and oral request (T-151) stating that this was not the law within this circuit.

Counsel for the appellant readily concedes that unfortunately Judge Carter's ruling is technically correct. U. S. v. Aadal 368 F2d 962 (2nd cir.1966) U. S. v. Tutino 269 F2d 488 (2nd cir. 1959) U. S. v. Pfizer 267 F.Supp. 91 (DCNY 1973). However it is urged that this court reconsider its position and alter the law in this area. This particular point is so well established in various state and federal courts as to be of the level of hornbook law. U. S. v. McGlamory 441 F2d 130 (5th cir. 1971) U. S. v. Fairchild 505 F2d 1378 (5th cir. 1975) U. S. v. Shavor 511 F2d 933 (4th cir. 1975) U. S. Chappell 353 F2d 83 (4th cir. 1965) McCoy v. U. S. 169 F2d 776 (9th cir. 1948)

The present holding of this court effectively denies a defendant of due process by standing trial in this particular

circuit, where the prosecution is guided by a lower standard of proof. (United States Constitution, 14th & 15th amendment) Although guilt must be established beyond a reasonable doubt throughout our legal system, what is involved here is a crucial link in that fact finding process. In the case at bar, much of the evidence against the defendant was circumstantial. The testimony indicated that the defendant was present at the scene but what he actually did was of course a jury question. In addition, the validity of the statement offered into evidence against the defendant was also a jury question involving the drawing of different inferences. The importance of this point is certainly not of academic postulation but probes to the crux of the verdict. The failure of the court to give the requested charge obstructed the true administration of justice and the proper functioning of the jury system.

It is urged by counsel for the appellant that it is entirely possible for a jury to have acquited the defendant had the case been held in another jurisdiction. By an individual standing trial in the second circuit, it places him in an uneven and unequal position than that of his "brethren at the bar" in another jurisdiction. The unfairness to the appellant is of

course obvious.

The center issue is the propriety of the requested charge. Under our judicial system, the only way an accused who is hauled before the bar can be stained with a conviction is if a jury, after weighing all the credible evidence, finds him guilty beyond a reasonable doubt. In arriving at that decision, the use of inferences is of course, in most cases, crucial. It would seem logical that since a defendant's guilt must be established beyond a reasonable doubt, that he should also be given the benefit of the doubt in questions of fact. Further, when an inference equally flows down parallel roads, one leading to guilt, the other leading to innocence, the defendant should be given the benefit of the favorable inference. U. S. v. Montoya 403 F2d 847 (5th cir. 1968) U. S. v. Sidan-Assam 457 F2D 1309 (5th cir. 1972) U. S. Ferg 504 F2d 914 (5th cir. 1974). In the Ferg case, the defendant was present as a passenger in a car where narcotics was found. In addition, he made a statement that he had been with the driver of the car for some hours before the arrest. The Court of Appeals for the 5th Circuit reversed the findings of a judge sitting without a jury. The Court stated that in order to "sustain a conviction based upon

circumstantial evidence, inferences to be drawn from the evidence must not only be consistent with guilt, but also must be inconsistent with every reasonable hypothises of innocence".

In the case at bar, the borderline level evidence present for conviction is far from sufficient to withstand a close scrutiny by a jury properly instructed. Due process is not an empty shell of mere words but rather heart and soul of our judicial system. To flush it away with a phrase "harmless error" erodes our system of justice. As was stated on June 15,1215 at Runnymede, "No free man shall be taken, or imprisoned or outlawed, or exiled, or in any way harmed, nor will we go upon him, nor will we descend upon him, except by the legal judgment of his peers and by the law of the land".

POINT II

DID THE TRIAL COURT ABUSE ITS DISCRETION BY RESTRICTING DEFENSE COUNSEL OF ITS CROSS EXAMINATION OF ITS AGENT JONES?

Defense counsel, during the course of the trial attempted to cross examine agent Jones concerning pertinent aspects of his testimony and its connection with the appellant. The trial judge refused to allow him to proceed in that area and when defense counsel attempted to explain what the purpose of his questioning was, the judge refused his explanation (T-86-91).

It is conceeded that the trial judge has discretion in limiting trial counsel's questioning where it is repititious. irrevelant, or a violation of one of the cannon's of evidence. U. S. v. Badalamente 507 F2d 12 (2nd cir. 1974) U. S. v. Cardillo 316 F2d 606 (2nd cir. 1966) Marrone v. U. S.355 F2d 238 (2nd cir. 1966) U. S. Pacelli 491 F2d 1108 (2nd cir. 1974). But here we have a different situation.

Counsel for the appellant attempted to examine upon an area concerning the agent's credibility and his activities concerning his relationship with the appellant. It was anticipated that the examination would have shown that the agent was given information by the appellant as to where the true perpertrator

Tony was located. The door to this area was blasted open by the government when they introduced the statements the appellant made to agent Jones (T-72-75) concerning Tony. A record of trial is cold, harsh, and inhuman and does not accurately reflect the passions of the hour when counsel tried to illicit the desired information from agent Jones, but was steadfastly and firmly denied by the trial judge (T-90-91).

By denying counsel's attempt to illicit the information and unreasonably restrict cross examination some courts have held this to be a sixth amendment (U. S. Constitution) violation because of a denial of counsel and full confrontation of witnesses against one. U. S. v. Newman 490 F2d 139 (3rd cir. 1974). However this circuit has held that where a trial judge abuses his discretion and restricts trial counsel's cross examination of a crucial witness, it is not error of a harmless nature, but rather tantamount of requiring a reversal of the conviction and a new trial. U. S. v. Jenkins 510 F2d 495 (2nd cir. 1975), U. S. v. Dorfman 470 F2d 246 (2nd cir. 1972), U. S. v. Barash 365 F2d 395 (2nd cir.1966). In the Barash case, trial counsel attempted to show possible bias upon the part of the revenue agent which would color his testimony against the defendant.

The trial judge refused to permit him to go into the area and directed that he "cut it out" and move on to another area. In that case the Court of Appeals for this circuit reversed in a stinging opinion stating that the right of cross examination of the revenue agent was crucial to the defense. To successfully attack the credibility and expose the underlying bias the individual might have toward the defendant could have destroyed his believeability before the jury.

In the case at bar, counsel for the appellant draws the comparison between the Barash case and its importance to the defendant's case. Cross examination in a criminal case is in many instances the only means by which counsel for the defendant can bring his client's point of view before a jury. The restriction of that legal artifact successfully emasculates that trial tactic.

Professor Wigmore stated some years ago when discussing cross examination:

"It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist, to appreciate this, its wonderful power, there has probably never

been a moment's doubt upon this in the mind of a lawyer of experience." 5 Wigmore, Evidence Sec. 1367 (3rd ed. 1940)

POINT III

DID THE TRIAL COURT ERR IN REFUSING TO GRANT APPELLANT HIS REQUEST FOR A HEARING ON HIS MOTION FOR A NEW TRIAL?

Approximately three days after the jury returned its verdict, one of the jurors, Mr. Ralph Elliot, went to see the trial judge stating that he would wish to change his vote from guilty to not guilty. A few days after that, Mr. Elliot went to Judge Carter expressing the same thoughts. This letter (Appendix p. 28) indicates that the jurors as a hold violated their sacred oath, disobeyed the trial judge's instructions and failed to deliberate in the instant action.

Counsel for appellant concedes that at this stage this court would be acting within its discretion if it elected to deny appellant's request for a new trial. The central issue presently is should the trial judge have granted counsel's request for a hearing on his motion for a new trial? (TS-2)*

The law on whether a juror may impeach his own verdict is a bit muddled. The older view was that a juror may never impeach his own verdict. Black v. U. S. 294 F 828 (5th cir. 1923), Walsh v. U. S. 174 F 615 (7th cir. 1909). However, in the past number of years courts have loosened their thinking to that of

*TS equals sentencing minutes
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the holding as in Mattox v. U. S. 146 U. S. 140 (1892). That case held that a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence and how far that influence operated upon his mind. A juryman may testify in denial or of acts of declaration outside the jury room or of internal impropriety in the jury room where evidence of such acts had been given as grounds for a new trial.

The law is clear that where an issue is raised as far as any internal impropriety or extraneous upon a sworn jury's deliberation process, a hearing should be held to determine the extent, if any, of the influence and its effect upon the jury. A.B.A.Standards relating to trial by jury sec. 5.7 (C,1,2), U. S. v. Concepcu Cueto 515 F 2nd 160 (1st cir. 1975), U. S. v. Rattenni 480 F2d 195, 198 (2nd cir. 1973), Owen v. U. S. ex rel Owen v. McMann 435 F2d 813 (2nd cir. 1970) or a juror's impartiality has been challenged. Sheppard v. Maxwell 384 U. S. 333 (1966) Marshall v. U. S. 360 U. S. 310 (1959).

Mr. Elliot's letter states that jurors demonstrated bias to the appellant, in their opinion as to the guilt or innocence of him before the testimony in the case was completed and that deliberations in fact never took place.

Such allegations are sufficient at this stage, to have the trial judge conduct an evidentiary hearing for the purpose of determining the validity and truthfullness of the allegations. If at the conclusion of that hearing, the trial judge should determine that any of the jury violated their solemn oath, a new trial should be ordered forthwith. Irwin v. Dowd 366 U. S. 717 (1961), Patterson v. Colorado 205 U. S. 454 (1907), Parker v. Gladen 385 U. S. 363 (1966), Miller v. U. S. 403 F2d 77 (2nd cir. 1968).

Judge Friendly, in his opinion in the Miller case, cites the concern among many jurists of questioning a juror's verdict after a trial is completed for fear of opening up a Pandora's Box. But he also goes on to assert that the defendant is entitled to a matter of right to a jury of his peers, unbiased and unprejudiced in their consideration of the case. When it appears that this is lacking, then a hearing is to be held and if the evidence warrants it, a new trial is to be ordered.

In the case of U. S. v. Diogurguardi 492 F2d 70 (2nd cir.1974), a juror, after a trial wrote the defendant a letter expressing clairvoyant powers and in general evidencing herself as a person of restricted mental capacity. In the dissenting opinion

written by Justice Feinberg, the telling point expounded is that if the juror's conduct is of such an irrational nature, then a hearing should be held to determine the competency. At the conclusion of the hearing, if competency is lacking, then a new trial should be ordered. A defendant is entitled to a trial of twelve sane jurors who will fairly and dispassionately listen to and determine the facts. The application to the case at bar is of course clear. Juror Elliot's letter evidences an atmosphere where drum-head justice prevailed. The jury, as a hold, had their hearts and minds against the defendant before all the evidence was heard. There was no attempt to comprehend the law or to discuss the facts, but rather just to brand the defendant as a felon without the decency of deliberating in the case. Without the forthright public concern and indignation expressed by Mr. Elliot, this distardly act commited against the appellant would have quietly sunk into the murkier side of the judicial sea.

In order that the ends of justice prevail, it is urged that the court remand the case for an evidentuary hearing on counsel's motion for a new trial.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED WITH INSTRUCTIONS TO DISMISS THE INDICTMENT WITH PREJUDICE.

Respectfully submitted,

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